United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7581

ORIGINAL

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

INEZ H. LENFEST and MARINE MIDLAND GRACE TRUST COMPANY OF NEW YORK, as Executors of the Estate of Harold C. Lenfest, and KENNETH F. YARRINGTON,

Plaintiffs-Appellees,

against

HAROLD W. COLDWELL,

Defendant-Appellant.

FERRO-BET CORPORATION OF AMERICA,

Plaintiff-Appellee,

against

HAROLD W. COLDWELL,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR HAROLD W. COLDWELL DEFENDANT-APPELLANT.

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Jurisdiction.

The decision of the United States District Court for the Southern District of New York was entered on 1 June 1976 (1a*). Final judgment was entered on 26 July 1976 (1a).

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* References, except as otherwise noted, are to the Joint Appendix, the contents of which have been agreed upon by all parties.

Motions of defendant Harold W. Coldwell, for an order (1) to set aside findings of fact and conclusions of law and judgment and grant a new trial, (2) to amend and supplement findings of fact and conclusions of law and to amend the judgment, and (3) to alter or amend the judgment (92a), filed on 28 July 1976 (1a), were denied by order of the District Court dated 26 October 1976 and filed 27 October 1976 (2a). Appellant, Harold W. Coldwell, filed a Notice of Appeal on 19 November 1976 (2a). The record on appeal was transmitted to the United States Court of Appeals for the Second Circuit on 17 December 1976. The jurisdiction of this Court rests on 28 U.S.C. § 1291.

Issues Presented for Review.

1. Was the S.S. PANOCEAN a constructive total loss at Baltimore on or about 3 April 1964?

2. May crew wages and maintenance during the two month period of repairs at Baltimore be taken into account in determining whether there was a constructive total loss where the crew was kept solely for the economic convenience of the shipowner in proceeding with the voyage after completion of repairs?

3. In determining whether the vessel became a constructive total loss at Baltimore, a regular port of call, where repairs were made, may the expenses of calling at prior ports solely for replacement of fuel and water lost en route by independent acts of crew negligence be taken into account?

4. May the fees of more than one supervising surveyor, or survey organization, be included as part of the cost of repairs in the determination of a constructive total loss?

5. May repair items which are of routine maintenance nature be allowed as cost of repairs for constructive total loss purposes?

Opinions Below And On Prior Appeal.

This consolidated action on marine insurance policies on "Anticipated Profit" was tried before Judge Robert Carter in the United States District Court for the Southern District of New York in May, 1974. The Revised Opinion and Order of Judge Carter was filed 14 November 1974. His opinion was not officially reported. Notices of Appeal from dismissal of the complaints were filed by plaintiffs on 13 December 1974. The case came on for argument before this Court on 17 September 1975 and was decided on 6 November 1975, decision officially reported in 525 F. 2d 717 (1975). The decision of the District Court having been reversed and the case remanded for further findings, the case came on for further hearing by Judge Carter in April, 1976. Judge Carter's further decision (79a), entered on 1 June 1976 has not been officially reported. This appeal has been taken from the subsequent judgment for the plaintiffs for the amount insured (90a) and from the denial of defendant's motion pursuant to Rules 52 (b) and 59 (a) and (e) of the Federal Rules of Civil Procedure.

Statement of the Case.

The circumstances of the parties, the nature of the insurance involved and the basic issues between the parties are set forth in the prior opinion of this Court, 525 F. 2d 719-723. Plaintiff's policy was for a valued amount of $150,000, payable only in the event of a total or constructive total loss of the vessel, valued at $240,000. Thus, there being no actual total loss, it was necessary, to prove a constructive total loss, for the plaintiffs to show that the costs of recovery and repair exceeded $240,000. At 525 F. 2d, page 725 this Court stated:

> The primary questions on this appeal are the correctness of the district court's calculation of allowable costs at Baltimore and its exclusion of any costs subsequent to the Baltimore repairs.

This Court held that except for certain expenses in connection with a short delay just outside Baltimore (not presently in issue) repairs for casualties which occurred after the ship had been repaired may not be cumulated and that the subsequent casualties the ship encountered were not to be taken into account. The case was remanded for the District Court to make further findings of fact and conclusions as to (a) whether allowable costs at Baltimore exceed $240,000 and (b) whether there was a compromised or arranged total loss (525 F. 2d at 728). The case came on for further hearing before Judge Carter on 6 April 1976. Three witnesses, John H. Wood and Harold S. Bowser, insurance brokers and average adjusters, and Ottar Grundvig, president of plaintiff Ferro-Bet, testified at the hearing (6-78a). Some of the exhibits received in evidence at the first trial were considered and a number of new exhibits were accepted in evidence. As to (b) the District Court held that the funds paid to the owners by Hull Underwriters were not in settlement of a constructive total loss claim. As there has been no appeal with respect to (b), the sole issue is whether allowable costs exceeded $240,000, there having been no constructive total loss unless allowable costs exceeded this figure. The District Court held that allowable costs did exceed $240,000 and that plaintiffs were entitled to recover. In so holding the District Court reaffirmed the allowances made in its original decision and added a number of items not regarded previously as proved. Defendant objected to certain of these allowances as more specifically set forth in its motions pursuant to F.R.C.P. Rules 52 and 59 (92a). Defendant underwriter on 19 November 1976 filed a notice of appeal from the entry of judgment in favor of plaintiffs on 26 July 1976 and the order filed on 27 October of denial of defendant's motion which had been filed 27 July 1976 pursuant to Rules 52 (b) and 59 (a) and (e).

Statement of the Facts.

The PANOCEAN was a steam ship of 4,085 gross tons, 365 feet in length, 48 feet breadth, 22 feet 7½ inches summer draft with compound steam engine. The vessel was launched in 1948 and recommissioned in 1953 (Joint Exh. 1, 283a). On October 17, 1963 the vessel was time chartered to plaintiff, Ferro-Bet Corporation of America for thirty months (284a). The purchase and operation of the vessel was a quasi joint venture (First trial transcript, 62, 63). Grundvig, president of Ferro-Bet, had the vessel surveyed before purchase (First trial transcript, 62; Exh. C, 276a) and later at Baltimore (Exh. 7, 175a), arranged a sub-charter and then financed the purchase of the vessel through assignment of time charter hire and sub-charter freights, and with additional advances of his own and other plaintiffs (First trial transcript, 21, 44, 62, 63; Exh. D, 278a); Markogiannis (president of the nominal shipowning corporation and treated throughout by the parties as actual owner) was to operate the vessel with Ferro-Bet attending to business details (First trial transcript, 14-16). Grundvig maintained close watch over the actual operations (First trial transcript, 22, 69, 84). The vessel was delivered to said time charterer on or about November 19, 1963 and in the following ten months made voyages under the time charter-party, trans-Atlantic and otherwise, earning voyage freights which were paid (284a). The PANOCEAN proceeded in ballast from Curacao to New Orleans where a cargo under a Cook Grains, Inc. sub-charter party was loaded and which thereafter was carried to Marseilles, France, where it was discharged. En route the vessel ran short of fuel and had to be diverted to Gibraltar for replenishment of supplies (Exh. 3, 131, 134, 135a; Exh. 30 (A) 261, 262a). Next PANOCEAN proceeded to Seville, Spain, where ore was loaded. The 2,360.629 long tons of baryte ore (in bulk) were consigned to Millwhite Mud Sales Co. in the United States (and such cargo was eventually discharged at New

Orleans). PANOCEAN then loaded boxboards and maritime pine at Leixoes, Portugal, discharged cargo at London, and loaded steel coils at Immingham destined for discharge at Baltimore (Joint Exh. 1, 284a). En route to Immingham she ran out of bunkers completely, was "blacked out" and arrived in port burning diesel oil (Exh. 3, 160, 162, 168, 169a). She then proceeded to Flushing, Netherlands, to take aboard bunkers. On 7 and 8 February, 1964 the ship's officers reported minor damage to hull plates due to contact with a lock wall at London, England (Exh. 15, 203a). No repairs were made at the time. PANOCEAN encountered "heavy weather" during its passage from Flushing, Netherlands to Baltimore, Maryland, February 24, 1964-April 3, 1964. Damages and/or equipment losses occurred on deck, and in the engineering spaces of the vessel (Joint Exh. 1, 525a). The vessel called at the Azores and Bermuda for fuel and water (Exhs. 31, 32; 347, 352a). The calls at the Azores and Bermuda were not caused by damage to hull or machinery. They were made solely to replenish supplies of fuel and water lost through independent acts of the crew (26, 28a; Exh. 15, 204, 206, 208, 209, 210, 212, 213, 214a). After arrival at Baltimore on 3 April 1964 damages to the Vessel were examined by surveyors (Exhs. 21, 15, 33; 289, 203, 356a). After discharge of the Baltimore cargo, repairs as requested were carried out by Maryland Shipbuilding & Drydocking Co., at cost of $155,006 (236a); however, repairs to the port main boiler were deferred and were not included in the costs of repairs actually made. A figure of $49,340 was submitted by Maryland Shipbuilding & Drydocking Co. for the cost of repairs to the port main boiler had they effected at that time, which figure was fair and reasonable (235a). PANOCEAN sailed for New Orleans on June 12, 1964, but after two hours of running time, suffered a steering engine telemotor control system failure and had to anchor. Repairs were effected and the voyage was resumed on June 16, 1964.

Argument.

On remand the District Court has affirmed its prior allowances in a total of $211,459.71. It has allowed as additional costs of repair a number of items aggregating $34,983.48 making a total allowance $246,443.19, an excess of $6,443.19 over the $240,000 required for constructive total loss purposes. Defendant does not contest a number of the additional sums allowed. It does contest allowances of (a) $9,631.91 for crew wages and provisions during repairs at Baltimore, (b) $7,113.91 for the costs of putting in to the Azores and Bermuda, (c) $8,207.10 as survey fee to Markogiannis, actually the shipowner, in addition to the allowed fee of $3,285 for survey and supervision of repairs to Bureau Veritas, and (d) $2,333.50 for four maintenance items not shown to have resulted from the casualties in question.

POINT I.

The item of $9,631.91 for crew wages and provisions during repairs at Baltimore should not be included in cost of repairs for ascertainment of whether there was a constructive total loss.

In its prior opinion this Court declared (525 F. 2d at page 722, footnote 11):

> Not all items allowable in general average are allowable in the determination of constructive total loss.

As to the determination of constructive total loss generally, this Court stated (525 F. 2d at page 722, fn. 11) that crew wages and provisions are not allowable as repair items unless the crew actually assisted in or was necessary in making repairs.

> The key question in determining whether an item is includible in a calculation of a constructive total loss figure is whether or not the act related to the ship's repair ....

This Court further said at page 725:

> Generally, wages and crew maintenance are not allowable as items unless the crew assisted in or was "necessary in connection with the repair of the vessel." *Compania Maritima Astra, S.A.* v. *Archdale* (The Armar), *supra,* at 32; *Hall* v. *Ocean Insurance Co.,* 38 Mass. (21 Pick.) 472, 480 (1839); Lord, The Hull Policy—Actual and Constructive Total Loss and Abandonment, 41 Tulane L. Rev. 347, 353 (1967). See also The Medina Princess, *supra,* at 433. On the other hand, where the crew makes repairs or would have assisted in repairs, or where the crew is necessary to guard the vessel or to superintend the repair work, the expenses may properly be considered in determining whether there was a constructive total loss. *Compania Maritima Astra, S.A.* v. *Archdale* (The Armar), *supra; Jeffcott* v. *Aetna Insurance Co.,* 40 F. Supp. 404 (S.D.N.Y. 1941), aff'd., 129 F. 2d 582 (2 Cir.), cert. denied, 317 U.S. 663, 63 S. Ct. 64, 87 L.Ed. 533 (1942).

This Court also noted (525 F. 2d 726, fn. 18) that the standards for determining whether crew wages may be included are different for general average costs than for determining constructive total loss. The rule as so stated is the same under both English and American Law. In Goodacre, *Marine Insurance Claims,* (1974) it is stated at page 227:

> Under English law, wages and provisions of the master, officers and crew during detention in a port whilst repairs are undergone, cannot be considered as part of the cost of these repairs, being a form of consequential loss, and "not part of the thing insured". (*Robertson* v. *Ewer,* 1786). However, under York/Antwerp Rules 1950 they may be recoverable as general average, as will be seen later.
>
> Nevertheless, wages and maintenance can be considered as part of the cost of repairs, where they are

> reasonably incurred in assisting with those repairs, or where the crew undertake duties for which outside labour would otherwise be required.

In Arnould on *Marine Insurance*, (15th edition, 1961) it is stated at p. 723 (sec. 767):

> So, the wages and provisions of the crew during a delay for repairs, or detention by an embargo, are not a risk within the policy; though this is so rather because these form part of the ordinary expenses of the voyage; and, perhaps even more clearly, because it is the ship that is the subject-matter of insurance, and it is damage to the ship against which the underwriter on ship promises to indemnify the owner; and this does not necessarily include all damages sustained by the shipowner.

In The Medina Princess, [1965] 1 Lloyd's Rep. 361, at page 443, repatriation items were withdrawn and the Court "wholly disallowed" wages, provisions and other items for crew at Djibouti (where the ship was wholly disabled—the items are set forth at page 367). The Court said with respect to the constructive total loss claim:

> I do so for two reasons. First, there is no evidence to justify finding that the crew would have been kept at Djibouti for five months. Secondly, even if the crew were kept at Djibouti for a short time, they would not be doing any work the cost of which would fall upon hull underwriters and their wages would not be chargeable to them. Hull underwriters would never be liable for such wages.

As to crew wages at the proposed final port of repair the Court said, in considering the partial loss claim, at page 523:

> Three other points of law remain and can be briefly dealt with. First the decision in *Robinson* v. *Ewer*, (1786) 1 T.R. 182; (1786) 99 E.R. 1111, and *de Vaux* v. *Salvador*, (1836) 4 A. & E. 420; (1836) 111 E.R. 845,

> place insuperable difficulties in the way of the plaintiffs' recovering crew's wages during repairs as part of the cost of repairs. Moreover there is nothing to show that such crew would have done any work the cost of which would have been recoverable from hull underwriters. This part of the claim has been wholly disallowed.

In *Compania Maritima Astra, S.A.* v. *Archdale* (The ARMAR), 134 N.Y.S. 2d ?? (S. Ct. 1954) the Court said at page 32:

> Item 18 for wages, etc. of a skeleton crew for 98 days, the estimated time it would take to repair the vessel, should not be allowed as there has been no persuasive showing of the necessity for such crew in connection with the repair of the ship.

In *Jeffcott* v. *Aetna Insurance Co.*, 40 F. Supp. 404 (S.D.N.Y 1941), *aff'd*, 129 F. 2d 582 (2 Cir. 1942), *cert. denied*, 317 U.S. 663 (1942) the Court, at page 409, disallowed the wages of "a vessel's captain" as supervisor of repairs as "he would be an unusual captain who would be qualified to supervise the performance of the contract in this case." In the leading case of *Hall* v. *Ocean Insurance Co.*, 38 Mass. (21 Pick.) 472 (1839), the Court, in computing the costs of repairs necessary for proof of a constructive total loss, excluded from "repairs", as not recoverable from hull underwriters, the cost of officers and crew at the intermediate repair port even though retention of the officers and crew was economically advantageous to the owner and even though it might be difficult, if not impossible, at some times and places, to procure other officers and seamen to prosecute the voyage after completion of repairs; if the services of the officers and seamen had been rendered as laborers in making the repairs, the rule would be otherwise and their labor would be chargeable.

The sole proof offered, either at the first trial or at hearing on remand, was that it would be less expensive to retain

the crew rather than to discharge them and then replace them after completion of repairs (see testimony of Wood, 41a, and Grundvig, 51, 52a; see also statement of plaintiffs' counsel to this effect, 48a). The allowed Item for crew wages, etc. in the sum of $9,613.91 includes crew wages and provisions during detention at anchor in the Chesapeake on departure from Baltimore, 2 days, in the sum of $332.73 (separately stated on page 3 of Exh. 37, former Exh. 27, 240a). The balance of crew wages, overtime, etc. in the sum of $9,281.18, were not related to ship repair. They are comparable to detention losses, loss of use of vessel, which are consequential losses not covered by hull insurance. As to costs of repatriation being urged as a prospective economic loss to justify retention of crew, it should be noted that this is one of the principal risks covered by Protection and Indemnity Insurance; P & I Insurance was introduced to cover those liabilities not covered at all by standard marine insurance policies, Arnould, *supra,* pages 129, 130; Goodacre, *supra,* pages 9, 10, 369-371. To the extent that the crew actually participated in repairs this is covered by Item 25, Exh. 28 (343a) "crew repairs No. 1 hold—H/W $1,072.55" (cleaned tank top, installed wooden ceiling; Exh. 15, 234a) which has been allowed separately and additionally by the Court (86a); otherwise the crew did not participate in repairs. This is made clear by plaintiff Lenfest's letter to Mr. Grundvig (President of Ferro-Bet) of 27 May 1964 (Exh. 30 A, 273a). Mr. Lenfest declared that he had been on board the ship on 26 May 1964 and

> The distressing condition of the ship is unchanged except for the Underwriters' approved repairs which have been made . . .
>
> The same crew was evidently on the ship as was there when I saw her in Baltimore on 3 April. They have done nothing whatsoever to improve the ship during this 2½-month period she has been in the shipyard.

> The engine room is filthy and the quarters are still in the same condition of uncleanliness as they were 2½ months ago, in spite of the fact that the crew has had nothing to do for over 2½ months.
>
> My feeling that the crew has done nothing to repair or improve the ship is confirmed by the Maryland Shipbuilding people, who told me that the crew had done nothing while the ship had been in their yard.

No evidence has been offered to the contrary. Compare the attitude of the crew which refused to work at Marseilles (Exh. D, 280a). In view of the complete custody and control by the shipyard, no separate watchman service was required.

The Item for crew wages, etc. in the sum of $9,613.91 should be disapproved except to the extent of allowance of crew wages and provisions in the amount of $332.73 during detention and repairs in the Chesapeake immediately after departure from Baltimore.

POINT II.

The claims for costs of deviations to the Azores and Bermuda should not be included in costs of recovery and repair at Baltimore for ascertainment of whether there was a constructive total loss at that port.

In the opinion of this Court there are brief references (525 F. 2d 723, 725) to "port of refuge". This term was contained in an obviously incomplete Agreed Statement of Facts in Joint Exhibit 1, Paragraph 8 (284a). The term "port of refuge" does not indicate that the deviations were caused by the damage to hull and machinery which were the subject of repair at Baltimore. "Port" is defined in *Webster's New Collegiate Dictionary* (1973) as:

> (1) a place where ships may ride secure from storms: HAVEN

(2a) a harbor town or city where ships may take on or discharge cargo.

"Refuge" is defined as:

(1) shelter or protection from danger or distress

(2) a place that provides shelter or protection

(3) a means of resort for help in difficulty

"Port" is defined in *The Oxford English Dictionary* (1970) as:

A place by the shore where ships may run in for shelter from storms, or to load and unload; a harbour, a haven.

The term "port of refuge" accurately describes an intermediate port where a vessel has called to replenish an unexpected shortage of fuel and water. See, *The* WAALHAVEN, 36 F. 2d 706 (2 Cir. 1929); *cert. denied,* 281 U.S. 747.

At page 726 of its opinion, this Court stated: "On remand the District Court will also make findings on the other expenses at Baltimore, and on the Azores and Bermuda expenses". It is uncontroverted that the PANOCEAN called at the Azores and Bermuda solely for the reason that she ran short of fuel and water and solely for the purpose of replenishing these supplies. These were the incidents which necessitated the diversions and the only such incidents. (26, 28a; see also log extracts, Exh. 15, 204, 206, 208, 209, 210, 212, 213, 214a). (Plaintiffs expand this to include "and for the safety of crew, vessel and cargo." A vessel which runs short of fuel at sea is obviously in a position of peril). The vessel did not call by reason of any damage to hull and machinery and an inference that the vessel put into the Azores and Bermuda as "ports of refuge" by reason of any hull damages is not correct. The fact that leakage in the port boiler was discovered after *arrival at Bermuda* and was promptly repaired by the crew during refueling at Bermuda does not affect the reason and the purpose of the call (Exh. 15, 206, 213, 270a). Necessity for replenishment of sup-

plies due to independent acts of the crew was the sole reason for putting in. This did not relate to "repairs". No surveys of damage were proposed or made, no specifications for repairs drawn up, no outside assistance for repairs was requested and no report of damage, other than of fuel shortage was made.

There is room for doubt whether bunkers were pumped overboard or into the bilges in the substantial amounts claimed (the transfer of tarlike bunker C fuel in winter, North Atlantic to settling tanks requires heating; it is not an insignificant operation). In view of past experiences, it is just as probable that the claim of negligent pumping overboard was put forward as a justification for the poor performance of the ship. The charter party (Exh. 5) represented the vessel as "capable of steaming, fully laden under good conditions about 10 knots on a consumption of about 20 tons of best grade Bunker C fuel oil". She never so performed. (Grundvig letter of 18 March 1964 to Owner; Exh. D, 278a). Under best of trim, most favorable weather conditions, not fully loaded, she made at best only 8.4 knots. Consumption of supplies was so excessive as to be "unbelievable". She ran short of fuel en route New Orleans to Marseilles, although bunkered in accord with charter party requirements and had to put in to Gibraltar to refuel (131, 134, 135, 261, 262a). She was maintained in a filthy and deplorable state (255, 256, 273a). She ran out of bunkers completely en route London—Immingham, was "blacked out" and had to arrive in port using diesel oil (161, 162, 168, 169a).

If, being bunkered according to charter party requirements, she did not have the necessary reserve for the expectable North Atlantic conditions, she was unseaworthy, THE WAALHAVEN, 36 F. 2d 706 (2 Cir. 1929), the consequences of which are not for Underwriters' account. Arnould, *supra* §§ 758, 761; Marine Insurance Act, 1906,

sec. 55, and Rule of Construction 7 thereof which reads:

> The term "perils of the seas" refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves.

So, too, if having a usual reserve, the vessel ran short of supplies by reason of continued heavy weather, this was not by reason of "fortuitous accidents or casualties of the seas", but rather an ordinary incident and expense of the voyage for the ship, and not an insured risk within the hull policy. Arnould, *supra*, Chapter 22, pp. 713 et seq., sec. 767; Chapter 23, pp. 755 et seq., citing at p. 756 *The Xantho*, [1887] 12 App. Cas. 503 at p. 509 (House of Lords) where Lord Herschell said:

> I think it clear that the term "perils of the sea" does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril "of" the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves, which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen.

Delay is specifically excluded by the Marine Insurance Act, 1906, sec. 55(2)(b). No case has been found supporting a claim for fuel consumed, or other expenses consequent upon delay in prosecution of the voyage from heavy weather.

If, nevertheless, it be assumed that the deviations to the Azores and Bermuda resulted from negligent pumping of fuel and water overboard and into the bilges as claimed by plaintiffs and noted in the log abstracts, the deviations

come within the rule stated by this Court that independent casualties incurred after the ship has been repaired may not be added to repairs already done. As shown above the "casualties" which were "repaired" at the Azores and Bermuda (replenishment of supplies) had nothing whatsoever to do with repairs of damage to hull and machinery. The damage from the lock wall at London was taken into account at Baltimore solely because repairs had not been made prior to arrival at Baltimore. Here the casualty involved was the allegedly negligent loss of supplies and "repairs" and "recovery" were made and complete at the Azores and Bermuda respectively. Nor can the deviations be considered as "recovery" in proceeding under her own power to Baltimore. Replenishment of fuel does not fall within the customary meaning of "recovery" as used with reference to a constructive total loss. Recovery, as used in the decisions relates to salvage such as raising a sunken vessel, releasing it from a strand and towage to a repair port. There was no towage, salvage or superintendence. The situation is the same as the entire voyage to Baltimore which was proceeding in ordinary course for accomplishment of the business purposes of the voyage, carriage and discharge of cargo. Certainly proceeding to Baltimore enabled repairs to be accomplished there but no one has suggested that the expenses of proceeding on the voyage throughout should be considered as "recovery".

The case is on all fours with The Medina Princess, [1965] 1 Lloyd's List L.R. 361 where the vessel had sailed from Rotterdam to China with a cargo of flour, with refueling scheduled for Djibouti. In the English Channel some 80 tons of boiler water were lost through crew negligence. There was subsequent similar loss in the Mediterranean. During the voyage the boilers and engines were damaged by this and other acts of negligence. En route to Djibouti the vessel put in to Malta, Port Said and Port Sudan for further supplies of bunkers and water and proceeded under her own power to Djibouti. Shipowner's minutely detailed

claim for constructive total loss at Djibouti, where the ship arrived in damaged condition, contained no claim for this loss of bunkers and water or deviation expense.

The Azores and Bermuda claims should be disallowed as not constituting constructive total losses of themselves or as forming a part of a subsequent claim for constructive total loss.

POINT III.

Markogiannis' "survey fee" of $8,207.10 should be disallowed. Only the fees of Bureau Veritas for $3,285 are allowable for superintendence and as survey fee.

Only one survey fee on behalf of owner may be allowed. *Agenoria Steamship Company* v. *Merchants' Marine Insurance Company*, 8 Com. Cas. 212 (1903); *Jeffcott* v. *Aetna Insurance Co.*, 40 F. Supp. 404, 409 (S.D.N.Y. 1941); affirmed, 129 F. 2d 582 (2 Cir. 1942); cert. denied, 317 U.S. 663. Markogiannis signed a survey as owner's surveyor under the name of "Michael G. Markogiannis, Inc., Marine Surveyor & Consulting Engineer" (Exh. 21). This was a sham; the survey was not that of an independent surveyor but rather that of the owner himself. For a survey (compare the fees of the Bureau Veritas) the fee was clearly exorbitant. The Markogiannis survey, Exh. 21, is virtually a duplicate of the Salvage Association, London survey, Exh. 15. The fee for the Salvage Association survey was $1,659 (Exh. 28, Item 37, 343a). The Markogiannis survey was not for the wages or hire of a superintendent entrusted with this particular work; it was simply and plainly an additional sum sought to be recovered from underwriters for owner's ordinary work. No specifications whatever have been given for the work done by the "surveyor". There was no proof of the details or cost of any supervision. The fee was equally exorbitant if characterized as supervision. The Markogiannis fee should be disallowed.

The Bureau Veritas item (5 accounts, Exh. 33) $3,285.00, is claimed as classification fees. It should be noted that one of these 5 accounts in the sum of $635.00 is for supervisory services rendered in the Chesapeake when the steering gear system failed shortly after departure Baltimore (see Bureau Veritas voucher No. SS-5581 included in Exh. 33). The remaining Bureau Veritas accounts may not be allowed as classification fees. This ship was classified with Lloyd's Registry of Shipping, not with Bureau Veritas (see Bureau Veritas survey report dated February 16, 1963, Exh. C, 276a, which so states). In the Register Book 1964-65, volume 1, of Lloyd's Register of Shipping, the PANOCEAN is listed as so classified with the classification of (Maltese Cross) 100 A1. For many years both the Salvage Association, London and Bureau Veritas have maintained offices at New York. All the Salvage Association records have been produced. There is no evidence whatsoever that the vessel was ever entered for classification with the Bureau Veritas (see, 275a). No Bureau Veritas records to this effect have either been produced or accounted for. No Bureau Veritas certificate of classification or of seaworthiness has been produced. If the Bureau Veritas surveys were for classification purposes, the Bureau Veritas vouchers (Exh. 33) would most certainly so state. There is no reference to classification in them. On the contrary each voucher specifies the services rendered as to "examine and report . . . and to recommend, *supervise* and report on repair(s)" (emphasis added). Furthermore, classification surveys may not be included for purposes of computation of a constructive total loss. *Chicago S.S. Lines* v. *United States Lloyds*, 2 F. 2d 767, 770 (N.D. Ill. 1924); affirmed, 12 F. 2d 733 (7th Cir. 1926); *Jeffcott* v. *Aetna Ins. Co., supra*, 40 F. Supp. at 409 (where only one survey fee was allowed). The leading case as to allowance of survey fees is *Agenoria Steamship Company* v. *Merchants' Marine Insurance Company*, 8 Com. Cas. 212 (1908). There is no reference in that case to classification fees. The sole ques-

tion was as to whether the cost of the sending of a surveyor from Liverpool to Australia to superintend repairs was excessive. It was so held.

The Bureau Veritas fees (5 accounts) of $3,285.00 should be allowed as survey fee and for supervision of repairs only and the Markogiannis "Survey Fee" of $8,207.10 disallowed.

POINT IV.

Routine maintenance items should be disallowed.

Claim has been made, and allowed by the District Court, for certain items as casualty repairs (Exh. 28, items 28, 29, 30, 31, 343a), which had not been submitted to or approved as such by Underwriters' surveyors, as follows:

Neptune machine replacement engine parts	$1,043.00
Neptune machine labor	525.00
T. Carroll, C. Corros—Labor on engine	464.50
G. Karaisaridis—Labor	301.00
Sub Total	$2,333.50

None of these items was mentioned in any Salvage Association Report or approved by the Salvage Association. The engine was thoroughly examined by the several surveyors as indicated by the Salvage Association, London survey report (Exh. 15, 229-231a) and repairs recommended (and accomplished by the shipyard). If the items in question were casualty repairs they would have been called to the attention of the surveyors and repairs accomplished by the shipyard under a supplementary item. Neither this procedure nor the examination, review and approval accorded *all* other items was followed. All other items which have been approved have been supported by the Salvage Association Reports, by invoices of the Maryland Shipbuilding and Drydock Company and other in-

voices which had been referred to and approved by the Salvage Association. Vouchers as so approved have been so stamped (see Exh. AA, 399a, and see letter of Great Eastern to Salvage Association dated 7 December 1964, Exh. 11, 193a, see also testimony of Wood, 29-36, 73, 74a). The items referred to in this paragraph were included in a letter written by Mr. Wood to the owner's agents on 5 January 1965 (Exh. 11, 195a). In his letter Mr. Wood said:

> "Please have Owners' surveyor advise why these damages were not brought to Underwriters' surveyor's attention for incorporation in his report, also have him indicate the log entries which record or make reference to these damages, since, if we are to obtain reimbursement for same, we must give Underwriters an adequate explanation as to why these damages are properly claimable."

This was in accordance with Rule VII, Approval of Repair Accounts, Rules of Practice of Association of Average Adjusters of The United States. See, Buglass, *Marine Insurance and General Average in the United States* (1973) p. 354.

> All repair accounts shall be examined, when practicable, by the owners' surveyor and a surveyor for underwriters before the statement is issued.
>
> The Adjuster shall insert a note in the average statement that this has been done and the result of same.

The requirement that these particular accounts be examined by a surveyor for underwriters and note inserted in the average statement that this had been done was not complied with (testimony of Wood 29-36, 73, 74a). The answer of Owners' agents on 30 January 1965 (Exh. 11, 200a) merely makes reference to "Shipowners survey report", the Markogiannis "survey" (Exh. 21) which in no way answers the questions raised. In the record before the

District Court no adequate explanation has been given for these items (Wood so testified, 73a). There is nothing in the record to indicate that these items were not ordinary maintenance and the description of the items would seem to indicate such maintenance. In view of the regular course of proceedings followed with respect to all other claimed items, these particular items must be regarded as unproved. They are comparable to the unsubstantiated and unexplained item of $11,097.96 for port disbursements which was disallowed by the District Court. They should not be allowed.

CONCLUSION.

The decision of the court below granting plaintiffs judgment on their complaints should be reversed.

Respectfully submitted,

SYMMERS, FISH & WARNER
Attorneys for Harold W. Coldwell, Defendant-Appellant,
345 Park Avenue
New York, New York 10022
(212) 751-6400.

Dated: New York, New York
12 January 1977

(60938)

375—Affidavit of Service The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

THE UNITES STATES COURT PF APPEALS FOR THE SECOND CIRCUIT

LENFEST
VS
COLDWELL

AFFIDAVIT
OF SERVICE

STATE OF NEW YORK,
COUNTY OF NY , ss:

ROBERT FORD being duly sworn,
deposes and says that he is over the age of 21 and resides at 755 Hancock st

That on the 13th day of January, 1977 19 at Joint App.....
he served the annexed brief for the defendant-appellant H.W. Coldwell and upon
HW, Shelby coates Jr, 61 Broadway NYNY: & Joseph Tarlowe, 11 Broadway , NY, NY
in this action, by delivering to and leaving with said attorneys
three copies of the appendix and three of the brief each true cop thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 13th
day of JANUARY, 1977 19.....

Robert W. Ford

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 19